UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/643
14 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 643

Case No. 706: AL-KISHALI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mayer Gabay;

Whereas, on 30 September 1992, Amir M.S. Al-Kishali, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(5) To order the Respondent:

(a) To rescind his decision of 8 July 1992, to maintain his previous decision of 4 October 1991, not to renew the Applicant's fixed-term appointment beyond 15 November 1991...

(b) To reinstate the Applicant to the post of Deputy Executive Secretary (D-2) of ESCWA [Economic and Social Commission for Western Asia], retroactive from 16 November 1991...

(c) To grant the Applicant a final fixed-term appointment, retroactive from 16 November 1991, until his mandatory retirement age of 60 as of 1 July 1996.

(6) To award the Applicant, in lieu of specific performance under items (a), (b) and (c) above, three years' net base salary as at his separation from ESCWA on 15 November 1991...

(7) To award the Applicant appropriate and adequate compensation for material and moral injuries suffered by him as a direct consequence of the Respondent's decisions clearly vitiated by denial of due process, prejudice, improper motives and extraneous considerations...

..."

Whereas the Respondent filed his answer on 1 July 1993;

Whereas the Applicant filed written observations on 6 October 1993;

Whereas, on 23 November 1993, the Applicant filed an additional statement and further documents;

Whereas, on 12 July 1994, the presiding member of the Panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant, a national of Iraq, entered the service of the United Nations on 1 September 1984, as Deputy Executive Secretary for the Economic and Social Commission for Western Asia (ESCWA) on a two year fixed-term appointment, at the D-2, step 1 level. He served thereafter on further fixed-term appointments, the first one of two years, through 31 August 1988, and the second one of three years, through 31 August 1991.

In July 1991, ESCWA was temporarily relocated to Amman, Jordan. The Executive Secretary of ESCWA recommended the extension of the Applicant's appointment for a further fixed-term period of one month, until 30 September 1991. He also recommended that, thereafter, Mr. Al-Saigh, a national of Saudi Arabia, be appointed to the post held by the Applicant.

The Applicant's appointment was again extended for a further period of one month and fifteen days, through 15 November 1991, in order to advertise the vacant post and to "select a suitable candidate under the new procedure" established by the Secretary-General "governing appointments at the D-2 level". The Applicant separated from the service of the United Nations on 15 November 1991.

The post of Deputy Executive Secretary was advertised under Vacancy Announcement No. 91-E-ECW-067-BG, with a deadline for applications of 27 January 1992. However, due to the suspension of recruitment as of 6 February 1992, no action was taken to fill the vacant post.

On 9 October 1991, the Applicant requested the Secretary-General to review the administrative decision not to extend his appointment. Having received no substantive reply to his request, on 16 December 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 5 June 1992. Its considerations and recommendation read, in part, as follows:

> "Considerations
>
> 15. ...the Panel decided to base its consideration on the Tribunal's own words (Judgement No. 345: Najjar [1985]), i.e.,
>
> > 'XI. ...the Tribunal's jurisprudence has consistently maintained that while, under the Regulations and Rules governing fixed-term contracts, the Respondent has [the] unquestioned right to terminate such contracts, it must nevertheless be ensured that the decision to terminate must not be tainted by caprice, prejudice, falsehood or any serious lack of due process.'
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> 16. The Panel noted that Appellant was recruited because he was an Iraqi national and that an important factor - if not the major factor - in the decision to terminate him was his nationality. While the Secretary-General may be required to take political considerations into account in making certain appointments, once an individual has served satisfactorily as a staff member - and there is no evidence to show that

Appellant had not - nationality should not play a part in decisions affecting his or her career as an international civil servant. The Panel was concerned, therefore, that the decision to terminate him may be deemed to have been tainted by prejudice.

17. In arguing that Appellant's due process rights were fully respected, Respondent points out that the vacancy was properly advertised and that Appellant apparently did not submit an application. Respondent does not explain how Appellant, who was in Baghdad and no longer a staff member, could have replied to an announcement which was distributed at Headquarters on 9 December 1991, with a deadline of 27 January 1992. More significantly, the Panel took Respondent's statement as a tacit admission that Appellant was not considered by the Senior Review Group established by ST/SGB/244.

18. It is clear that the decision to advertise the prospective vacancy was made prior to Appellant's termination on 15 November 1991, (...), Appellant, as a person already in the service of the UN, should have been considered for a post for which he had the requisite qualifications and experience.

19. ...the Panel concluded that the decision to terminate him had been tainted by a serious lack of due process.

Recommendation

20. The Panel recommends that Appellant be paid compensation equal to his net base salary from 16 November 1991 to 31 December 1992."

On 8 July 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant a copy of the Board's report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. Bearing in mind:

(a) That you had been appointed in 1984 without any other candidate being considered;

(b) That the decision not to renew your appointment was taken to allow qualified candidates to be considered for

the post of Deputy Executive Secretary of ESCWA under ST/SGB/244 of 26 August 1991, with a view to ensuring that the selected candidate would meet the highest standards of efficiency, competence and integrity; and,

(c) That no nationality was excluded from consideration in the vacancy announcement which was circulated for the post,

the Secretary-General cannot accept the conclusions and recommendations of the Board. He finds that the contested decision conforms with Article 101, paragraph 3 of the Charter and staff regulation 4.2 and has decided to maintain the contested decision.

Due to the current reorganization of the Secretariat and the temporary suspension on recruitment decided by the Secretary-General on 6 February 1992, no action has been taken to fill the post of Deputy Executive Secretary. If and when it is decided to proceed with the filling of the post, you will be considered along with the other candidates by the Senior Review Group which will advise the Secretary-General on this matter. In accordance with staff regulation 4.4 the fullest regard will be given in the process to your experience and qualifications."

On 30 September 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy of the renewal of his fixed-term appointment beyond 15 November 1991.

2. The Applicant was not properly considered for extension of his appointment.

3. The Respondent erred in rejecting a unanimous JAB recommendation.

4. The Respondent engaged in "obstruction of justice" and failed to give a reasoned decision.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right nor the legal expectancy of continued employment beyond the expiry of his fixed-term appointment. Accordingly, his separation from service did not violate his rights.

2. The decision not to renew the Applicant's fixed-term contract was not motivated by prejudice or other extraneous factors.

3. The advice of joint bodies is in the nature of recommendations, and staff do not have a right to expect the Administration to accept unanimous recommendations of those joint bodies.

The Tribunal, having deliberated from 29 June to 14 July 1994, now pronounces the following judgement:

I. The Applicant held the post of Deputy Executive Secretary of ESCWA, a D-2 post to which he had been appointed by the Secretary-General in September 1984. He served on a fixed-term appointment which was extended several times and finally expired on 15 November 1991. The Applicant claims that his fixed-term appointment should have been further extended and that its non-extension was "vitiated by denial of due process, prejudice, improper motives and extraneous considerations".

II. In particular, the Applicant alleges that the Executive Secretary of ESCWA favoured the non-extension of his appointment in order to accommodate another candidate of Saudi-Arabian nationality.

The Applicant also submits that he had a legal expectancy to continue in the post until it was filled through the regular selection process. He claims that on account of his good work and his years of service, he had the right to continue to be employed

until he reached the mandatory retirement age. Furthermore, he alleges that he was entitled to a "reasoned decision" for the non-renewal of his appointment.

III. The JAB, when considering the Applicant's case, concluded that the Applicant had been unfairly treated because he had not been able to apply for his former post when it was advertised. This complaint was not raised by the Applicant in his submission to the JAB, or the Tribunal.

IV. The JAB appears to have considered the Applicant's case in the erroneous belief that the post in question had not only been advertised, but filled by a candidate other than the Applicant. However, the Secretary-General, in his final decision on the JAB's report, noted that the post in question had not yet been filled, due to a recruitment freeze. The Secretary-General added that "if and when it is decided to proceed with the filling of the post, you will be considered along with the other candidates". Subsequently, the Tribunal was informed by the Applicant that the post had been filled in October 1993, by a candidate other than himself.

V. The first concern of the Tribunal in considering this case is to determine clearly the issues that it is called upon to decide.

In this respect, the Tribunal holds that the only issue properly before it is the non-renewal of the Applicant's fixed-term appointment. In the Tribunal's view, the other issues raised in the course of the proceedings, i.e. the advertisement of the post after it was vacated, the opportunity the Applicant might have had for the post, the misunderstanding which led the JAB to believe erroneously that the post had been filled, the decision to apply the recruitment freeze to the vacant post and the final decision to fill the post a year later, are all extraneous to the case. If the Applicant was of the opinion that he had been wronged in connection with these

events, he should have raised his grievances through the appropriate procedures, within the relevant time-limits. The Tribunal now turns its attention to the non-renewal of the Applicant's fixed-term appointment.

VI. The Tribunal finds no merit in the allegation that the Executive Secretary of ESCWA contrived to accommodate a Saudi-Arabian candidate through the non-renewal of the Applicant's fixed-term appointment. The post vacated by the Applicant was subsequently advertised. The Executive Secretary's recommendation as to who should fill the post was therefore not adopted. Thus, even if such a sequence of events was envisaged by the Executive Secretary of ESCWA (and this was not established), then it failed to materialize and is not germane.

VII. The Applicant further claims that he had a legitimate expectancy to renewal of his appointment until the post was filled pursuant to the recruitment process. He submits that the renewal of his appointment was suggested twice and gave rise to an expectancy. He also claims that the Administration should compensate him because of its decision to vacate the post before the recruitment process was completed.

VIII. The Tribunal is unable to agree with the Applicant. In the Tribunal's view, no commitment to extend the Applicant's fixed-term appointment until the post was finally filled arose as a consequence of the two short term renewals of the Applicant's appointment. The Administration was entitled to change its policy and to decide to vacate the post rather than continue to fill it on a provisional basis.

IX. With regard to the Applicant's claim that, on account of length of service and performance, he had an expectancy of renewal

of his appointment until he reached the mandatory retirement age, the Tribunal recalls its jurisprudence that none of these elements validly creates an expectancy of renewal of a fixed-term appointment.

X. The Applicant also claims that he had the right to a "reasoned decision" when the Administration decided not to renew his fixed-term appointment. The Tribunal notes that, in fact, a reasoned opinion appears in paragraph (b) of the Secretary-General's final decision, which states, "The decision not to renew your appointment was taken to allow qualified candidates to be considered for the post of Deputy Executive Secretary of ESCWA under ST/SGB/244."

XI. For the foregoing reasons the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mayer GABAY
Member

Geneva, 14 July 1994

Maria VICIEN-MILBURN
Executive Secretary